

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>JACALYN BROWN</b>	:	SMALL CLAIMS DETERMINATION DTA NO. 819906
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 1995 through August 31, 1995.	:	

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Petitioner, Jacalyn Brown, 460 East 79<sup>th</sup> Street, #20A, New York, New York 10021, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1995 through August 31, 1995.

A small claims hearing was held before Arthur S. Bray, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York on February 2, 2005 at 1:15 P.M. with all briefs to be submitted by June 15, 2005, which date began the three-month period for the issuance of this determination. Petitioner appeared by LRC Group, Inc. (Lawrence R. Cole, CPA). The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Victor J. Molina at the hearing and Justine Clarke Caplan, Esq., on the brief).

***ISSUE***

Whether petitioner is liable for the sales and use taxes due on behalf of 107 AMEX Gourmet Deli., Inc. as a person responsible for the collection and payment of sales tax pursuant to Tax Law §§ 1131(1) and 1133(a).

***FINDINGS OF FACT***

1. 107 AMEX Gourmet Deli., Inc. (the “Deli”) was a corporation which engaged in the retail sale of sandwiches and salads. One hundred percent of the stock of the corporation was owned by a Ms. Helen Gavales. The Deli sold food on a take-out basis only.

2. The Division of Taxation (“Division”) issued a Notice of Determination (Assessment # L-014953037-1), to petitioner, Jacalyn Brown, which assessed sales and use taxes for the period March 1, 1995 through May 31, 1995 in the amount of \$7,156.79 plus interest in the amount of \$2,953.35 and penalty in the amount of \$2,146.87 for a balance due of \$12,257.01. The Division also issued a Notice of Determination (Assessment # L-014953036-2), dated May 7, 1998, to petitioner which assessed sales and use taxes for the period June 1, 1995 through August 31, 1995 in the amount of \$6,877.00 plus interest in the amount of \$2,548.50 and penalty in the amount of \$2,063.10 for a balance due of \$11,488.60. In each instance, the notices were premised upon the Division’s position that petitioner was responsible for the sales and use taxes due from the Deli.<sup>1</sup>

3. At one time, Ms. Gavales was directly involved with the operation of the Deli. However, she became ill, and in her absence, Ms. Gavales’s friend and accountant, Mr. Meyer Zimmerman, oversaw the operation of the business. Ms. Gavales died on May 13, 1996.

4. Petitioner has a high school education and was hired to work at the Deli as a part-time bookkeeper. She was an officer for about 30 days beginning in December 1992. When she first went to work for the business, Mr. Zimmerman thought that petitioner needed to be an officer in

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<sup>1</sup> When the hearing was originally scheduled, the Division had raised an issue regarding the timeliness of the petition to the extent that it challenged notices issued for the periods ending November 30, 1995 and February 29, 1996. Prior to the hearing, petitioner conceded that the petition was untimely with respect to these periods. Upon the consent of the parties, the hearing proceeded on the merits of the petition to the extent that it challenged notices assessing tax for the remaining periods listed in the petition. That portion of the petition protesting the later quarters is deemed withdrawn.

order to have the authority to sign checks when Ms. Gavales was unavailable. When Mr. Zimmerman learned that an individual did not need to be an officer in order to have check signing authority, her position as an officer was terminated. On January 5, 1993, petitioner resigned as president and secretary of the Deli effective January 10, 1993. At the same time, Ms. Gavales assumed these positions. The change of positions was memorialized in a written document dated January 5, 1993 and signed by a notary public. However, the statements in the document were not sworn to before the notary. The notary was a bank manager who was brought to Ms. Gavales's apartment by Ms. Gavales's brother because Ms. Gavales was bedridden at the time.

5. As the bookkeeper, petitioner paid invoices for items such as vegetables or milk when directed to do so by the manager, Stanley Long. Petitioner did not have the authority to make payments on her own and never paid an invoice without being directed to do so.

6. Petitioner never considered herself to be an officer of the corporation and did not have a financial interest in the Deli. Petitioner did not hire or fire employees of the Deli. The task of hiring and firing employees was performed by Stanley Long, the manager of the Deli. Petitioner never signed any contracts or loan documents on behalf of the corporation.

7. As the accountant for the Deli, Mr. Zimmerman prepared all of the tax forms and represented the Deli on tax compliance matters. Mr. Zimmerman went to the store two or three times a week. He reviewed the mail, decided which creditors to pay, including tax obligations, and calculated the payroll. On occasion, petitioner signed tax returns at the direction of Mr. Zimmerman. However, petitioner never prepared a tax return and never signed a tax return without a directive from Mr. Zimmerman. At Mr. Zimmerman's request, petitioner may have

also signed checks which accompanied the tax returns. At the hearing, petitioner could not recall if she signed tax returns in December 1992 or January 1993.

8. The Deli made a practice of beginning the business day with a certain amount of cash in its cash registers. In the evening, petitioner removed the additional cash and prepared the cash drawer for the next business day. The additional cash was placed in an envelope and then placed in a safe. Thereafter, the money would then be handed to Mr. Zimmerman when he came to the store.

9. Petitioner's name has appeared on a series of documents such as the following:

(a) Petitioner signed the Deli's Application for Registration as a Sales Tax Vendor. The form bears a stamp dated December 30, 1992 in the upper left corner of the first page. Petitioner is the only person listed under the question which asks for all of the "owner/officers." The word "Pres" appears next to petitioner's name on the first page and the word "President" was placed next to petitioner's name as her title. Although petitioner signed the form, she did not write the words "Pres" or "President."

(b) Petitioner's name appears as the chairman or chief executive officer of the Deli on records maintained by the New York State Department of State. Her name was spelled on the document as follows: "JACQUELINE BROWN." This is not the way that petitioner spells her name.

(c) Petitioner signed a 1995 form WT-4-AEZ which is a Quarterly Combined Withholding and Wage Reporting EZ Return. She signed this document because she was asked to do so.

(d) Petitioner's name appears on the line calling for the signature of the vendor on a quarterly New York State and Local Sales and Use Tax Return for the period March 1, 1995

through May 31, 1995. Mr. Zimmerman's name appears on the line for the signature of the preparer. Petitioner's name was not written by her.

### ***SUMMARY OF THE PARTIES' POSITIONS***

10. Petitioner's representative maintains that petitioner had no control over the daily operations of the Deli and that there is no rational basis for concluding that petitioner was responsible for collecting and remitting taxes during the period in question. In this regard, it is noted that petitioner was not an officer during the period in issue.

11. The Division contends that petitioner has not presented clear and convincing evidence that she was not responsible for the taxes due from the Deli. In support of this position, the Division points to those documents which contain petitioner's name. The Division also notes that petitioner was an officer, that petitioner had check-signing authority and exercised that authority and that petitioner signed tax returns. The Division also submits that the document evidencing petitioner's resignation as an officer is legally insufficient because it is improperly verified and the testimony of George Gavales, regarding the execution of the document, was not plausible.

12. In a reply brief petitioner stresses that she was a part-time employee, that she was not an officer during the periods in issue and that she did not have the authority to remit the tax. Further, she was being asked to sign documents that she did not understand and was unfamiliar with how the amounts set forth were computed.

### ***CONCLUSIONS OF LAW***

A. Tax Law § 1133(a) imposes personal liability for taxes required to be collected under Articles 28 and 29 of the Tax Law upon a person required to collect such tax. A person required to collect such tax is defined as "any officer, director or employee of a corporation . . . who as

such officer, director or employee . . . is under a duty to act for such corporation . . . in complying with any requirement of [Article 28]” (Tax Law § 1131[1]).

B. The determination that an individual is a responsible person depends upon the particular facts of each case (*Stacy v. State*, 82 Misc 2d 181, 183, 368 NYS2d 448, 451; *Matter of Autex Corp.*, Tax Appeals Tribunal, November 23, 1988). The relevant factors to consider when determining whether a person has such a duty to act for the corporation include, *inter alia*, authorization to sign the corporate tax return, responsibility for management or maintenance of the corporate books, authorization to hire and fire employees and derivation of substantial income from the corporation or stock ownership (*see*, 20 NYCRR 526.11[b][2]; *Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022, 513 NYS2d 564; *Matter of Blodnick v. State Tax Commn.*, 124 AD2d 437, 507 NYS2d 536, *appeal dismissed* 69 NYS2d 822, 513 NYS2d 1027).

C. Here, the clear weight of the evidence supports the conclusion that petitioner is not responsible for the sales and use taxes due from the Deli. The uncontradicted evidence is that petitioner was a part-time employee who had no interest in the ownership of the business. There is no dispute that petitioner was an officer in December 1992 and January 1993. However, it is also clear that petitioner resigned as an officer in January 1993. Therefore, petitioner was not an officer of the Deli during the period in issue. Although the document evidencing the resignation was not sworn to before a notary, the circumstances surrounding the execution of the document such as the signature of a notary public and the witnessing of the signing of the document by Mr. Gavales give credence to petitioner’s testimony that she resigned from her position as an officer well before the periods in issue (*see, Matter of Spallina*, Tax Appeals Tribunal, February 27, 1992). Petitioner did not have any responsibility for the management of the Deli. Rather, the

manager of the Deli was Stanley Long who had the authority to hire and fire employees. Further, the Deli's accountant, Mr. Zimmerman and not petitioner, was responsible for the preparation of the tax returns. It is recognized that Mr. Zimmerman may have asked petitioner to sign tax returns. Nevertheless, under the circumstances presented, this was merely a ministerial act. It is further recognized that either Mr. Long or Mr. Zimmerman could have asked petitioner to sign checks. However, there is no evidence that petitioner had the authority to decide on her own what creditors should be paid. Therefore, petitioner has established that she did not have sufficient authority and control over the affairs of the Deli to be considered a responsible officer or employee (*see, Matter of Constantino*, Tax Appeals Tribunal, September 27, 1990). It follows that she is not responsible for the sales and use taxes due from the Deli during the period at issue.

D. The documentary evidence offered by the Division does not support a different result. The Application for Registration as a Sales Tax Vendor bears a date which falls within the period when petitioner briefly held the title as president. Therefore, it is consistent with petitioner's explanation. Similarly, the information from the Department of State is undated and, as a result, it is difficult to determine the weight to which the document is entitled. Further, the fact that petitioner's first name is misspelled requires one to question the reliability of the information supplied to the Department of State. Lastly, although petitioner signed a 1995 withholding tax return, petitioner did not deny that on occasion she signed tax returns at the direction of the Deli's accountant. The fact that petitioner signed a tax return does not contradict petitioner's explanation that she never prepared a tax return or signed a tax return without a direction from someone else.

E. It reaching the forgoing conclusions, the references in petitioner's brief to the determination of a presiding officer and an administrative law judge have been disregarded (Tax Law § 2010[5]; § 2012).

F. The petition of Jacalyn Brown is granted and the notices of determination, dated May 7, 1998, are canceled.

DATED: Troy, New York  
July 21, 2005

/s/ Arthur S. Bray  
PRESIDING OFFICER